

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0056
)	DEPARTMENT A
)	
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
FRANCISCO MORENO,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082977

Honorable Richard S. Fields, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann

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B R A M M E R, Presiding Judge.

¶1 Francisco Moreno appeals from his conviction for conspiracy to sell a narcotic drug, arguing insufficient evidence supported his conviction. We affirm.

¶2 On appeal, we view the facts in the light most favorable to sustaining the verdicts. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On July 10, 2008, an undercover Tucson Police Department officer went to a park posing as a drug buyer. He made contact with a “trapper”—a middleman who leads drug buyers to potential sellers—who guided him to a specific residential address. There were several men in the front yard, including Moreno. Moreno approached the officer’s truck, brandishing a firearm. But another one of the men told Moreno, “[n]o, it’s cool,” and directed the officer and trapper to a nearby house where Moreno lived. The trapper purchased .308 grams of crack cocaine at that address.

¶3 On July 28, 2008, the same officer returned to the park and made contact with another trapper, who again directed him to Moreno’s residence. After going in the house, the trapper returned and said they had to go someplace else. The trapper used the officer’s cellular telephone to call someone known as “ATL,” after which they returned to the park to wait. When Moreno rode a bicycle by the officer’s vehicle, the trapper said he could “get [drugs] from that guy” and approached Moreno. The officer saw Moreno indicate “no” to the trapper by shaking his head, after which Moreno approached the officer and said “word on the street is that you’re a cop.” Moreno then began taking pictures of the officer with his cellular telephone and told the officer he was taking the

pictures “just to make sure.” The officer left, and Moreno was arrested several hours later.

¶4 Moreno was charged with aggravated assault with a deadly weapon and sale of a narcotic drug based on the events of July 10 and with offering to sell a narcotic drug based on the events of July 25. He was also charged with conspiracy to commit sale of a narcotic drug, based on his conduct on both dates. On the fourth day of trial, the trial court directed a verdict in Moreno’s favor on the charge of offering to sell a narcotic drug. The jury acquitted Moreno of aggravated assault and sale of a narcotic drug but found him guilty of conspiracy. Upon finding Moreno had one historical prior felony conviction, the court sentenced him to a partially mitigated, seven-year prison term. This appeal followed.

¶5 In addressing Moreno’s challenge to the sufficiency of the evidence, we view the facts in the light most favorable to sustaining the verdict and resolve all inferences against Moreno. *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). “To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury.” *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). To convict Moreno of conspiracy to sell a narcotic drug, the state was required to prove that, “with the intent to promote or aid the commission of an offense,” Moreno “agree[d] with one or more persons that at least one of them or another person” would sell a narcotic drug, and that “one of the parties commit[ted] an overt act in furtherance” of that

offense. A.R.S. § 13-1003(A); *see also* A.R.S. § 13-3408(A)(7) (prohibiting sale of narcotic drugs); A.R.S. § 13-3401(5), (20)(z) (cocaine narcotic drug).

¶6 The state alleged in the indictment the overt acts committed in furtherance of the conspiracy were at least one of the three other counts charged—aggravated assault, sale of cocaine, offering to sell cocaine—or Moreno’s having taken pictures of the undercover police officer “for the purpose of displaying the image to assist co-conspirators in not being arrested.” Moreno asserts that, because the jury acquitted him of the other charges, it is implicit in the verdicts that he was neither a participant nor an accomplice to the drug deal that occurred on July 10 and that the jury “did not believe” he had brandished a gun when approaching the undercover officer that day.¹ Thus, he reasons, the jury must have convicted him on a theory he had taken the photographs of the undercover officer in furtherance of the conspiracy. He argues, however, that there was no evidence he did so as part of an agreement to sell drugs and that his conviction therefore must be vacated.

¶7 The premise for Moreno’s argument is flawed. First, that the jury acquitted him of aggravated assault does not necessarily mean it did not believe Moreno had approached the officer while holding a gun. It may have concluded he lacked the requisite intent. *See* A.R.S. §§ 13-1203(A); 13-1204(A). Moreno’s conduct, viewed in

¹Moreno asserts there was no “evidence of offering to sell a drug” before the jury because the trial court directed a verdict on that charge. But the court did not instruct the jury to disregard any evidence when it did so. Because Moreno’s conspiracy conviction was supported amply by other evidence, we need not decide if the evidence relevant to that charge could have supported the jury’s conspiracy verdict.

light of the other evidence, supports Moreno's conspiracy conviction. Moreno desisted when another man told him that it was "cool"—permitting the inference that Moreno had acted at that individual's direction. That person then directed the officer to another nearby residence to purchase drugs. Moreno's speculative and unsupported assertion that "[d]rug dealers do not point guns at prospective buyers" notwithstanding, the jury could have concluded from this evidence that Moreno had participated in a conspiracy to sell cocaine.

¶8 Second, to the extent the jury's verdicts may be viewed as inconsistent, Arizona law permits inconsistent verdicts on separate counts. *See State v. Zakhar*, 105 Ariz. 31, 32, 459 P.2d 83, 84 (1969); *State v. DiGiulio*, 172 Ariz. 156, 162, 835 P.2d 488, 494 (App. 1992). "It is well-known that in the privacy of the jury room, instructions are not always understood and followed. Compromises are made." *Zakhar*, 105 Ariz. at 32, 459 P.2d at 84. An acquittal does not necessarily mean the jury was unconvinced of Moreno's guilt; an acquittal instead could be "a product of jury lenity." *United States v. Powell*, 469 U.S. 57, 64-65 (1984); *see also State v. Garza*, 196 Ariz. 210, ¶ 7, 994 P.2d 1025, 1027 (App. 1999) (inconsistent jury verdicts may be result of leniency); *State v. Estrada*, 27 Ariz. App. 38, 40, 550 P.2d 1080, 1082 (1976) (acquittal on substantive charges does not preclude conviction for related conspiracy charge). Thus, we cannot disregard evidence properly before the jury in determining whether sufficient evidence supported Moreno's conviction based on the possibility its other verdicts reflect the jury

found that evidence insufficient to sustain other charges. As we have explained, it is also possible the jury's other verdicts reflect nothing more than leniency.

¶9 For the reasons stated, we affirm Moreno's conviction and sentence.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge